No. 82-981

In the Supreme Court of the United States

October Term, 1982

CLARK OIL AND REFINING CORPORATION,
Petitioner,

vs.

HAROLD W. ALDERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Although Petitioner has ostensibly listed the parties to this action, it has not complied with Supreme Court Rules 34 (b) and 28.1. It is Respondent's understanding that Petitioner is a subsidiary of Apex Corporation. Hence, Petitioner did not list all of its "parent companies, subsidiaries . . . and affiliates . . . ." Rule 28.1.

Moreover, Petitioner has refused to comply with Rule 28.4 (c). Petitioner seeks to have a Missouri statute (*viz.* R.S.Mo. § 290.140) declared to be unconstitutional, but it has not recited in any document that it has served a copy of its Petition upon the Attorney General of the State of Missouri. Undoubtedly, this is because Petitioner is aware that the Attorney General of Missouri did seek to uphold the constitutionality of the statute in an earlier challenge in the lower federal courts, *Rimmer v. Colt Industries Operating Corp.*, 495 F. Supp. 1217 (W.D. Mo. 1980), *reversed*, 656 F.2d 323 (8th Cir. 1981).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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STATEMENT OF THE CASE

Proceedings Below

Respondent believes certain facts regarding the course of proceedings below should be noted.

Respondent filed suit against Clark Oil & Refining Corporation in the Circuit Court of Jackson County, Missouri in March, 1977. Before Clark filed a responsive pleading, Respondent filed his First Amended Petition for Damages on May 4, 1977 (L.F. 1-6).[1] Respondent

1. Respondent is uncertain as to what portion of the record in the lower court is before this Court. Respondent will make reference to the Record on Appeal that was before the Missouri Court of Appeals.

alleged, *inter alia*, that Clark violated R.S.Mo. § 290.140 (the so-called Missouri Service Letter Law) by providing him with a service letter that lied about why it had discharged him from his employment with Petitioner. Petitioner filed its Answer to that Petition. Defendant did *not* claim in its Answer that § 290.140 was unconstitutional (L.F. 7-9).

Respondent's cause proceeded to trial in April, 1979, and on April 13, 1979, a jury returned a verdict in favor of Respondent, assessing damages of $150,001.00 against Petitioner (L.F. 10). Petitioner sought a new trial from this verdict but it did not attack the constitutionality of § 290.140 (L.F. 12-33).

The trial court ordered a new trial on July 24, 1979 (L.F. 36).

Thereafter, on August 22, 1979, Respondent filed a Second Amended Petition for Damages quite similar to his earlier Petition except that Respondent increased the amount of damages he sought to recover (L.F. 37-40). Petitioner filed an Answer to this Petition, but again it did not raise the issue of constitutionality (L.F. 41-42). Finally, on March 26, 1980, Clark amended its Answer to raise the issue of constitutionality (L.F. 49-50).

Respondent's cause proceeded to trial a second time in September, 1980, and on October 2, 1980, the jury returned a verdict against Clark, this time assessing damages of $100,001.00 (L.F. 70).

Thereafter, Petitioner moved to set aside this verdict on multitudinous grounds (L.F. 72-86). The trial court obliged Petitioner again on January 15, 1981, granting a judgment notwithstanding the verdict based on a finding that there was insufficient evidence of legal malice to support an award of punitive damages. The trial court

left the award of actual damages intact (L.F. 88-89). The trial court expressly eschewed Clark's constitutional argument (L.F. 87).

Thereafter, Respondent appealed the decision of the trial court to the Missouri Court of Appeals. Petitioner filed a cross-appeal from the decision of the trial court that allowed the jury's verdict on the issues of liability and actual damages to stand. Petitioner's cross-appeal *only* challenged the constitutionality of R.S.Mo. § 290.140; it did *not* challenge the sufficiency of the evidence to support the jury's finding that Clark falsely stated its reasons for discharging Respondent.

The Missouri Court of Appeals found for Respondent on May 4, 1982, *Alderson v. Clark Oil & Refining Corporation*, 637 S.W.2d 84.

No exposition of the progress of this case would be complete without digressing for a moment to consider the history of the challenges to this statute.

In 1922 this Court upheld the statute Petitioner is now challenging in *Prudential Insurance Company of America v. Cheek*, 259 U.S. 530 (1922). The challenge in that case was based on traditional equal protection grounds.

In 1980 the assault on the Service Letter Statute was renewed when the United States District Court for the Western District of Missouri struck down the statute as being void for vagueness and violating the equal protection clause of the Fourteenth Amendment, *Rimmer v. Colt Industries Operating Corp.*, 495 F. Supp. 1217. The real key to *Rimmer* (and the way the court circumvented *Cheek*, supra) was a holding that false utterances in service letters about an employee's work history are protected by the First Amendment per *Gertz v. Robert Welch, Inc.*,

418 U.S. 323 (1974), thereby triggering stricter scrutiny for vagueness and equal protection purposes. That holding was appealed by plaintiff to the United States Court of Appeals for the Eighth Circuit.

Within a few months both the Missouri Supreme Court and the Eighth Circuit (in *Rimmer*) were faced with constitutional challenges to the statute reflecting the reasoning of the district court in *Rimmer*. The Missouri Supreme Court acted first, and on April 6, 1981, that Court declined to follow the federal district court, upholding the statute, *Hanch v. K.F.C. National Management Corporation*, 615 S.W.2d 28 (Mo. en banc 1981). Although this was a four to three opinion, only one of the dissenting opinions rested on constitutional grounds. Four months later the Eighth Circuit reversed the district court in *Rimmer v. Colt Industries Operating Corp.*, 656 F.2d 323.

The key to both the Supreme Court and Eighth Circuit Opinions was a finding that the First Amendment did not shield corporate employers that make false statements about employees. Having resolved the First Amendment issue, the courts applied traditional standards of review in resolving the vagueness and equal protection issues.

Neither of the losing parties in *Hanch* and *Rimmer* sought review by this Court.

Details of the Case

Although Petitioner *generally* sets out details of the facts in this case it omits certain facts that were relevant to the Court of Appeals in its Opinion of May 4, 1982.

First, Respondent established evidence that was uncontroverted that Petitioner's agent, DeNeff, said that he would fabricate reasons for discharging Respondent (T. 40,

69-70). Although DeNeff testified extensively at trial, he *never* denied that he had expressed an intention to lie about Petitioner's reasons for terminating Respondent. DeNeff was, of course, the same person who signed the service letter that formed the basis of this cause.

Second, Petitioner's explanation of its reasons for discharging Respondent suffered from inconsistencies. Respondent claimed he was discharged on December 7, 1976, and Clark's service letter tended to confirm this.[2]

In its service letter Petitioner claimed it terminated Respondent because of a shortage of funds uncovered in an audit on December 7, 1976, which was consistent with a termination date of December 7. At trial, however, DeNeff admitted that no audit was conducted on December 7 (T. 158). The only audit that was performed by Petitioner was conducted on December 8, 1976, the day *after* Respondent's discharge. Obviously Respondent was not discharged because of alleged shortages that were not uncovered until *after* his discharge.

Moreover, Petitioner had a hard time deciding how Respondent was separated from his employment. Respondent claimed he was fired by Petitioner. In the service letter Petitioner agreed that *it* terminated Respondent's employment. However, when DeNeff answered interrogatories under oath on behalf of Petitioner, he claimed that Alderson quit his job (T. 89). In his live testimony DeNeff resolved this dilemma by taking two mutually exclusive positions: part of the time he claimed Respondent resigned and part of the time he claimed that he

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2. The service letter said that Alderson was terminated on December 17, 1976, but DeNeff acknowledged that the 17th was a typographical error and the letter should have read December 7th (T. 158).

terminated Respondent.[3] Of course if DeNeff told the truth when he swore to the aforementioned interrogatory answer, he lied in the service letter and vice versa.

Finally, the manner in which Clark calculated the alleged shortages was in issue. Respondent denied that there was *any* shortage. Petitioner's records did reflect a shortage, but the amount of that shortage was diverse. Clark claimed variously that the amount of the shortage was $655.98 (P. Ex. 11a), $685.28 (P. Ex. 12), $611.78 (P. Ex. 22), $781.32 (P. Ex. 8a), $696.55 (P. Ex. 9a), and $400.00 (P. Ex. 21). Respondent also adduced evidence that Clark altered one of its documents to show a "shortage" (P. Ex. 12a).

One other fact should be noted. In its service letter Clark claimed that Respondent was discharged because his station was not clean and because of a failure to timely file certain records, and DeNeff testified that he had reprimanded Respondent for those reasons (T. 123). Respondent denied that DeNeff *ever* reprimanded him (T. 25-26).

In short Respondent claimed that Petitioner set out with an avowed intention to fabricate reasons for discharging him. Thereafter, Respondent claimed, Petitioner did just that by claiming that it fired him for shortages uncovered after he was fired, by manufacturing those shortages, and by falsely claiming a history of reprimands for station cleanliness and inadequate record-keeping.

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3. DeNeff never explained why the letter claimed Clark fired Alderson if, in fact, Alderson quit. Presumably, the letter was written when DeNeff was in a "discharge" rather than "resignation" mood.

SUMMARY OF ARGUMENT

R.S.Mo. § 290.140 (1978), the so-called Service Letter Law, is not void for vagueness. Requiring an employer to "truly state" why it has discharged an employee does not require it to guess at the meaning of the law. All the statute requires (as construed by Missouri courts) is that an employer truthfully state the reason it discharged an employee even though the facts underlying that reason may be false.

The statute also does not infringe on employers' freedom of speech. The statute punishes conscious deceit. This Court has repeatedly held that the intentional lie is outside the scope of First Amendment protections.

Permitting punitive damages in service letter cases on a finding of what Missouri calls "legal malice" is not a violation of First Amendment rights. In a service letter case legal malice means intentionally stating false reasons for discharge, knowing that they are false. Such a finding is the equivalent of what this Court has required in defamation actions.

Finally, the fact that the statute is limited to corporate employers does not violate the equal protection clause of the Fourteenth Amendment. The statute does not burden fundamental rights or proceed along suspect lines. The statute is rationally related to a legitimate state interest.

REASONS FOR DENYING THE WRIT

I. The Missouri Service Letter Law Is Not Void for Vagueness nor Does It Impermissibly Infringe on the First Amendment Rights of Corporate Employers.

Before turning directly to Clark's vagueness arguments, certain principles regarding the "void-for-vagueness" doctrine should be noted.

First, when determining whether a statute is overly vague, the threshold question to be addressed is whether the statute is such that "men of common intelligence must guess at its meaning," *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973). This does not mean that the language of the statute must specifically address every possible contingency that may arise thereunder. As this Court noted in *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 578-579 (1973): "[T]here are inherent limitations in the English language with respect to being both specific and manageably brief . . . ." The Court eschewed an attitude "intent on finding fault at any cost . . . ." In the context of Petitioner's argument, the Court must determine whether a statute that requires an employer to truly state its reason or reasons for discharging an employee would cause persons "of common intelligence [to] guess at its meaning."

Second, in determining whether a statute is vague, a person governed thereby is charged with knowledge of all judicial interpretations of the statute, as well as knowledge of the statute itself, *Winters v. New York*, 333 U.S. 507, 514-515 (1948). State statutes are reviewed by federal courts as though they read the same as state

appellate courts have interpreted them, *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 273 (1940). Hence, in determining whether § 290.140 is vague, Clark must be held to knowledge of any Missouri appellate decision construing the statute.

Finally, the degree or rigor applied by this Court in reviewing the question of vagueness is directly proportional to the extent that the statute affects fundamental rights. Thus, where a statute governs business activities, the degree of leeway accorded a state legislature is much greater, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

Clark's main complaint as to vagueness is that it does not understand the command of the statute that requires an employer to issue a letter (upon request) "truly stating what cause, if any" it had for discharging an employee. Apparently Clark's argument is that it does not know what the truth means.[4]

The absurdity of Clark's argument is probably its best answer. If all statutes that required people to tell the truth were vague, then very few laws would stand.

Clark argues that it does not know if truly state means that it must state "just," or "correct," or "substantially true" reasons. Petitioner argues, for example, that it is unclear whether the statute is satisfied when the employer believes the reasons for discharge to be true.

It is difficult to think of a more ludicrous claim. As construed by Missouri courts, all the Service Letter Statute

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4. Clark's utter indifference to the truth, documented by the record in the lower court, might tend to indicate a moral incapacity that borders on sociopathic mendacity. Clark does not claim, however, that its inability to distinguish truth from falsehood is pathological in its origins.

requires is that an employer truly state its own subjective reason for discharge. Even if the employer is completely mistaken as to the factual basis for its decision to discharge an employee, it does not violate the statute so long as it accurately states its reason for discharge.

A good example of how that rule works in practice is provided by *Newman v. Greater Kansas City Baptist and Community Hospital Association*, 604 S.W.2d 619 (Mo. App. 1980). In that case plaintiff was discharged for allegedly stealing purses on hospital premises. That reason was given in her service letter as being the true cause for her discharge. At trial plaintiff proved conclusively that she was not guilty of the thefts, but she did not prove that her employer did not *believe* her to be a thief when it discharged her. Because of an absence of evidence on this latter point, a verdict for plaintiff was reversed. In doing this, the Court of Appeals noted that:

> There can be no doubt that in the absence of the [service letter] statute, Paula Newman was subject to dismissal at will and without explanation [citation omitted]. The right Paula Newman claims can derive only from the statute which became part of her arrangement for employment with the hospital. [Citation omitted.] The contention that evidence that she did not steal proves a submission under the statute—without other contradiction that it was not the true cause of discharge—disallows an employer even the benefit of an honest sincerity and invests to an employee a right akin to property. The plaintiff would require that the cause stated be actual in fact—that is, for cause—and by implication impose liability for failure of investigation and judgment. *The statute does not go that far as a remedy.*

(Emphasis added.) *Ibid.*, at 622-623. The Supreme Court of Missouri made a similar pronouncement in *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 56-57 n.2 (Mo. en banc 1981). *See also*: *Williams v. Kansas City Transit, Inc.*, 339 S.W.2d 792 (Mo. 1960). The statute *only* imposes liability when an employer falsely states its own subjective reason for discharging an employee.

In the case *sub judice* Alderson did not argue that Clark violated the statute because it falsely claimed that he was responsible for shortages. Rather, he contended that Clark's violation stemmed from falsely accusing Respondent of being a thief *and* claiming that was the reason for discharge when Clark knew that it did not discharge him for that reason.

How a law that requires an employer to simply tell the truth *about what it believes* can be held to be void for vagueness is a riddle. Unfortunately, it is a riddle for which Petitioner has no solution.

Petitioner next argues that the Service Letter Law violates First Amendment rights of employers by disallowing them good faith mistakes and imposing strict liability for such good faith mistakes. In making this argument, Clark relies on the line of cases concerning defamation actions represented by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Petitioner's characterization of the status of the Service Letter Law—that it penalizes good faith mistakes—is absolute nonsense. Such was the holding in *Rimmer v. Colt Industries Operating Corp.*, 656 F.2d 323, 328 (8th Cir. 1981), wherein the Court correctly noted that, "Missouri has decided that a corporate employer has no *right*

to lie about a former employee's job history." (Emphasis added.)

In its defamation cases this Court has never held that the First Amendment extends its protections to intentional deceit; indeed quite the opposite is true. In *Garrison v. Louisiana,* 379 U.S. 64, 75 (1964), the Court noted that:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. * * * * That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. * * * * Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Not surprisingly Petitioner makes no attempt to claim that its particular falsehoods were uttered in good faith. Two juries and one appellate court found that Petitioner claimed it fired Alderson because he was a thief, *knowing* that accusation was utterly and completely false. No one had to engage in metaphysical dialogues to measure Petitioner's mendacity; the clear evidence was that it *lied* about Alderson's work history. Petitioner's attempt to cloak itself in the protection of the First Amendment is at once disingenuous and disgusting.

Clark's inability to claim its own good faith is fatal to its vagueness argument. Even if one assumes, *arguendo,*

that it is theoretically possible that some employer, somewhere, might someday make a good faith mistake in stating why it fired an employee and be held liable under the statute therefor, that is not the case *sub judice*. A statute "will not be struck down as vague, even though marginal cases could be put where doubts might arise." *U.S. Civil Service Commission*, supra, 413 U.S., at 579.

The statute is not void for vagueness.

II. Allowing Punitive Damages on a Finding of What Missouri Law Describes As "Legal Malice" in a Service Letter Case Is Not in Conflict With Constitutional Protections for Freedom of Speech.

Under the cases construing the Service Letter Law, punitive damages may be returned if the jury finds the the employer guilty of what Missouri law calls "legal malice," *Herberholt v. dePaul Community Health Center*, 625 S.W.2d 617, 624 (Mo. en banc 1981). Petitioner claims that allowing punitive damages without a showing of actual malice is constitutionally deficient under *Gertz v. Robert Welch, Inc.*, supra, and *New York Times Co. v. Sullivan*, supra. A number of responses are appropriate.

First, what constitutes legal malice in Missouri should be considered. The Missouri Supreme Court has described legal malice as follows: "Legal malice exists where a wrongful act is intentionally done without just cause or excuse . . . ." *Herberholt*, supra, 625 S.W.2d at 624. "This means that defendant not only intended to do the act which is ascertained to be wrongful, *but that he knew that it was wrongful when he did it.*" (Emphasis added.) *Beggs v. Universal C.I.T. Credit Corporation*, 409 S.W.2d 719, 723 (Mo. 1966). In contrast under Missouri law actual malice "exists when one with a sedate, deliberate

mind and formed design injures another." *Herberholt*, supra, 625 S.W.2d, at 624.

Respondent would submit that a finding of what Missouri describes as legal malice is no different from what this Court required in *Gertz*, supra, and *New York Times v. Sullivan*, supra, 376 U.S., at 279-280, namely that defendant made a false statement "with knowledge that it was false or with reckless disregard of whether it was false or not."

In the context of a Service Letter case a defendant may be held liable for punitive damages only if it makes false statements as to why it discharged an employee *and* if it acts with legal malice, i.e. it makes false statements intentionally and knowing that they are wrong, *Beggs*, supra; cf. *Booth v. Quality Dairy Co.*, 393 S.W.2d 845, 851 (Mo. App. 1965).

If a jury were required to find "actual malice" as defined by Petitioner (*viz.* ill will), such a standard itself would be constitutionally deficient, *Garrison v. Louisiana*, supra, 379 U.S., at 78-79; and *Meiners v. Moriarity*, 563 F.2d 343, 350-351 (7th Cir. 1977).

Clearly, there is no conflict between the standard prescribed in *Gertz* and *New York Times* and the standard by which punitive damages are awarded in Service Letter cases.

In order for Clark to be guilty of legal malice in the case at bar, it had to make false statements about Alderson's work history, *knowing that such statements were false.* As the Missouri Court of Appeals noted in commenting on the sufficiency of the evidence in the case *sub judice* to warrant a finding of legal malice:

> There was evidence from which the jury could have found, as their verdict shows that they did find, that the reasons for plaintiff's discharge stated in the letter were false, *and known by defendant's agent DeNeff to be so when the letter was written.*

(Emphasis added.) 637 S.W.2d, at 87.

Petitioner's attempted distinction between "legal malice" and "actual malice" is nothing more than semantic sleight of hand. The important thing to remember is that under Missouri law a finding of legal malice requires a finding of intentional deceit. Such a finding is not at odds with constitutional minima.

III. The Service Letter Law Does Not Violate the Equal Protection Clause of the Fourteenth Amendment; the Statute Is Rationally Related to a Legitimate State Interest.

Petitioner's final (and most confusing) argument is that corporations are denied equal protection because the Service Letter Law is limited to corporate employers. Respondent believes that the Eighth Circuit demolished this argument in *Rimmer*, supra, 656 F.2d, at 329. He would merely add that a similar holding was made in *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) when this Court noted:

> In deciding the constitutional propriety of the limitations in such a reform measure we are guided by familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," . . . and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

This Court has traditionally avoided the role of a super-legislature in determining whether a legislative regulation may be applied to one group and not another where the legislative policy does not affect fundamental rights or proceed along suspect lines, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and *Clements v. Fashing*, ... U.S. ....., 73 L.Ed. 2d 508 (1982). Of course corporations are not part of any "suspect class" so attention must be focused on the question of whether the Service Letter Law affects fundamental rights.

As was noted above the kind of speech punished in service letter actions is the known falsehood. Since that category of speech is not protected by the First Amendment, *Garrison v. Louisiana*, supra, it follows that no fundamental right is affected by the statute.

The mere fact that the Missouri legislature chose to limit the protection of the Service Letter Law to corporate employees does not mean that the statute is unconstitutional. As Justice Pitney noted sixty years ago, there is clear justification for the existence of the statute, *Prudential Insurance Company of America v. Cheek*, 259 U.S. 530 (1922). The statute is rationally related to a legitimate state interest, *Rimmer*, supra, 656 F.2d, at 329.

CONCLUSION

Respondent sincerely believes that the Petition for Certiorari filed herein is entirely groundless. He would urge this Court to study carefully the opinions in *Hanch*, supra, and *Rimmer*, supra, and deny Clark's Petition.

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